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No. 88-1848

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

~~MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND~~ BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

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July 14, 1989

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ERRATUM RE CONSENT OF ALL PARTIES TO FILING OF BRIEF *AMICUS CURIAE*

Contrary to the first paragraph of the facing page, counsel for respondents have consented to the filing of the instant Brief *Amicus Curiae*. However,informal notification of such consent was not given until late in the day on July 13, 1989, at which time the Motion and Brief were in the final printing.

By virtue of the consent of all parties, copies of which are being filed herewith, the Motion for Leave to File, pp. i-v *infra*, requires no action by the Court, and should be considered only as the statement of Interest of the *Amicus*, in which capacity it has been incorporated by reference in the Brief. *Infra* at 1.

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Product Liability Advisory Council, Inc. ("PLAC", the "Council"), pursuant to Rule 36.1 of the Court, respectfully requests leave to file a brief *amicus curiae* in support of the petition of General Motors Corporation ("GM") for a writ of certiorari. Counsel for petitioner have consented to such filing, but counsel for respondents have not consented.

PLAC is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983.[1] Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

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1. PLAC members include: American Home Products Corporation, American Telephone & Telegraph Company, American Honda Motor Company, Inc., Automobile Importers of America, Inc., The Budd Company, Clark Material Systems Technology Company, The Coleman Company, Dow Chemical Company, Eaton Corporation, Federal Mogul Corporation, FMC Corporation, Fiat Auto U.S.A. and Ferrari, N.A., Firestone Tire & Rubber Company, Fruehauf Corporation, Great Dane Trailers, Inc., Hyundai Motor America, J.L.G. Industries, Kawasaki Motors Corporation, U.S.A., M.A.N. Truck & Bus, Mitsubishi Motor Sales of America, Monsanto Company, The Motor Vehicle Manufacturers Association of the United States, Inc., and its members, Nissan Motor Corporation, U.S.A., Otis Elevator Company, Playtex, Inc., Porsche Cars North America, Inc., RJR Nabisco, Inc., Saab-Scania America, Inc., Strum, Ruger & Company, Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., U-Haul International, Inc., United States Tobacco, and Volkswagen of America, Inc.

The members of the Council are obvious and frequent "target defendants" in class actions of all types, among them entrepreneurial ventures by firms specializing in plaintiffs' commercial class actions such as this case. As such, Council members have real and recurring vital interests which are significantly and adversely impacted by the decision below.

The decision of the court of appeals, reported at 860 F.2d 250 (7th Cir. 1988), strikes at fundamental principles governing court awarded attorney fees in class actions. First, the court of appeals declared that the governing statute, 15 U.S.C. § 2310 (d)(2), which provides attorney fees to a plaintiff who "finally prevails," does not apply when a plaintiff class "prevails" by way of settlement. 860 F.2d at 256. Second, the circuit court found that the express Congressional mandate that such fees must be "based on actual time expended," even where applicable, "does not prevent the court from awarding risk multipliers." 860 F.2d at 256-57.

The foregoing errors, grave enough in themselves, were but the prelude to the circuit court's dispositive ruling. Citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078 (1987) *(Delaware Valley II)*, the court of appeals recognized that a risk or contingency enhancement, even though not foreclosed, had been subjected to "stringent requirements." 860 F.2d at 254-57. The court below, however, deemed the policy rationale of *Delaware Valley II* inapplicable to "common fund" cases and accordingly declared its own "multiplier" rule without any further reference to this Court's decision. 860 F.2d at 257-58 (Opinion, Part II).

The resulting decision is diametrically opposed to the unanimous view of the Court that "risk multipliers," even if proper, are never case-specific, and falls equally afoul of the majority's holding that they should almost never exceed one-third of the lodestar. *Delaware Valley II*, 483 U.S. at —, 107 S.Ct. at 3089. Instead, the court of appeals specifically directed the district court "to examine plaintiffs' attorneys' reasons for asserting that *this class action* was a risky undertaking and to determine whether these reasons justify the *75% multiplier* they seek (or some multiplier less than that)." 860 F.2d at 258 (emphasis added). The upshot on remand was an additional charge of $1,408,680 against the fund available to the class in this case, over and above the lodestar attorney and paralegal fees of nearly $2.4 million originally awarded. 661 F. Supp. 1368, 1393 (N.D. Ill. 1987).

The members of the Council are understandably troubled by this development. Should the opinion below become the governing law, negotiated common fund settlement pots will require additional "sweetening" by defendants to accommodate a "second helping" by counsel. This increase in the price of settlement will be all but automatic in class actions, which require court approval based on fairness to the class.

The rule enunciated below threatens to drive up the cost of litigation in other ways. The circuit court's suggested *carte blanche* to double even multi-million dollar lodestars (860 F.2d at 258) will make previously marginal cases worth fighting to a finish. There is no readily discernible policy rationale for such a result. (Indeed, under the bizarre construction of the Magnuson-Moss Act adopted below, a defendant may often *reduce* its fee exposure by trying a losing case to

the bitter end.) The member companies of PLAC are directly affected and understandably distressed by the prospect of being conscripted into participation in so absurd an exercise.

The possible award of up to 200% multipliers in any given case will continue to skew the litigation process even after merits disposition or settlement. With millions at issue, fee-setting will, as here, generally metastasize into "a second major litigation," the very outcome which this Court has been at pains to avoid. E.g. *Hensley v. Eckerhardt*, 461 U.S. 424, 437 (1983). The further delay in disbursing the remaining fund to eligible class members while such litigation proceeds will largely vitiate the potential for recouping customer goodwill which often motivates settlement in commercial and consumer class actions.

Paying successful claimants' attorneys up to twice what a court has found reasonable will also clearly increase defendants' costs of doing business. These, like all costs, will in turn be passed on in the form of higher prices, lowered efficiency and other general economic burdens which, inevitably and ironically, ultimately penalize the consuming public as a whole, in order to enrich certain attorneys.

Such windfalls are not permitted even in cases involving major national policies, such as civil rights or the protection of the environment, e.g. *Delaware Valley II*. There is even less reason to tolerate them in the purely commercial arena. Certainly, the law firms typically involved in cases like the present action have no claim to largesse unavailable to their brethren of the public interest bar. The members of the Council, as litigants in both types of cases, are in a position to

observe and experience this unjustifiable incongruity at first hand.

The development of a comprehensive set of standards by which reasonable attorney fees can be determined without precipitating a second major litigation in each case came to fruition last Term in *Delaware Valley II*. The instant case provides an ideal opportunity to close the escape hatch in that scheme which the court of appeals' decision would open and to make explicit the obvious application of *Delaware Valley II* to all court awards of attorney fees. Significant resources at all levels of the justice system may then hopefully be returned to purposes more fitting than the preferential enrichment of certain segments of the bar.

WHEREFORE, it is respectfully requested that PLAC be granted leave to file the attached brief *amicus curiae*.

Respectfully Submitted,

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BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus respectfully refers the Court to the accompanying Motion for Leave to file the instant brief, *supra* at i-v, which sets forth the interests of itself and its members in this case.

PRELIMINARY STATEMENT

Amicus adopts in its entirety petitioner's Statement appearing at pages 2-9 of the Petition. Petitioner's statement emphasizes and tellingly sets forth those aspects of the case which bear on the court of appeals' erroneous attempt to avoid applying *Delaware Valley II* to fees paid from a "common fund" rather than directly from a losing defendant's pocket.

Additional facts upon which *amicus* urges grant of the instant petition are set forth as part of *amicus'* statement of Reasons for Granting the Petition, directly below.

REASONS FOR GRANTING THE PETITION

I. UNLESS IMMEDIATELY CLOSED BY THIS COURT, THE "COMMON FUND LOOPHOLE" IN *DELAWARE VALLEY II* OPENED BY THE COURT OF APPEALS THREATENS ABSURD AND INDEFENSIBLE CONSEQUENCES, WHICH WOULD CALL SERIOUSLY INTO QUESTION THE INTEGRITY, ACTUAL AND PERCEIVED, OF THE JUDICIAL PROCESS

As indicated *ante* at ii-iii, the court of appeals' misconstruction of 15 U.S.C. § 2310 (d)(2) was but the stepping stone to the key feature of its decision. Waving aside this Court's recent teaching in *Delaware Valley II*, the circuit court apparently found that the $2.4 million "lodestar" awarded by the district court was not presumptively reasonable compensation to plaintiffs' counsel. The court then directed the district court to consider application of a fee enhancement or "multiplier" in an

amount up to the 75% bonus requested by counsel, noting that an additional 25% might properly be sought in other cases. The stated criterion for this award was to be the trial court's *ex post facto* view of the riskiness of this particular action, and the sole declared rationale for this approach was to compensate plaintiffs' counsel for other losing contingency fee cases. 860 F.2d at 254.

As the court below recognized, 860 F.2d at 257, both this result and its reasoning were "squarely addressed," and comprehensively rejected, in *Delaware Valley II*, in which a majority of the Court permitted the possibility of fee enhancements only where a class of cases proved incapable of attracting competent counsel in a particular market. See 107 S. Ct. at 3089 (O'Connor, J. concurring). Of particular relevance, all members of the Court in *Delaware Valley II* directly and specifically rejected, under any circumstances, the concept of a case-specific "risk multiplier" based on the prospects for success of a particular action. *Delaware Valley II* thus categorically "rejected [the] argument that a prevailing party was entitled to fee augmentation to compensate for the risk of nonpayment." *Missouri v. Jenkins*, 57 U.S.L.W. 4735, 1989 Westlaw 63856 (U.S.) at *4, No. 88-64 (June 19, 1989).

Defendants Are Vitally Interested in the Fair Disposition of Common Fund Settlements

The circuit court felt free to sidestep *Delaware Valley II*, based solely on the fact that this case involved a fee to be paid from a "common fund." The essence of

the court's analysis, repeated at various points throughout the opinion, is that

> [i]n a common fund case, where there is no direct or immediate danger of unduly burdening the defendant, a court has more latitude in exercising its equitable powers to determine whether the plaintiff class should compensate its attorneys for their risk of nonpayment. And it remains arguable that, at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose.

860 F.2d at 254. See also *id.* at 252-55, *passim*. This "distinction without a difference" rests on a demonstrably erroneous premise.

When cases are settled, as the overwhelming majority are, defendants will be every bit as burdened by common fund windfalls to plaintiffs' counsel as by equivalent statutory fee bonanzas. The reason is simple and obvious. Once "common fund multipliers" have been declared the law, they must, like any other financial factors, be taken into account in negotiating the amounts of future settlement funds. In class actions, moreover, court approval of settlements is mandated, and class members have a due process right to appear and voice objections as part of the process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Accordingly, sufficient increases in settlement common funds to allow for a full "second helping" to counsel will be demanded, with a straight face, in the name of "fairness to the class."

Thus, perversely, under the court of appeals' decision, it will often be in a defendant's interest to resist a

common fund settlement, particularly in a statutory fee case, whenever the common fund "sweetener" demanded is equal to or more than the incremental cost of defense.[2]

Beyond the fact that all funds, common or statutory, come from their pocket, target defendants such as petitioner and *amicus'* members are vitally interested in the fairness and equity with which any fund in court they create is divided between plaintiffs and lawyers. In this case, for example, petitioner faced claims under the Magnuson-Moss Act stemming from alleged shortcomings in its products. Key motivations a manufacturer may have in such a situation in agreeing to a prompt and generous settlement include the desire to satisfy its customers, recoup its goodwill, and restore its image following adverse publicity often generated by plaintiffs' counsel as a settlement lever. A court-imposed rule which strips away part of its customers' recovery in order to pay attorneys millions of dollars *over and above a presumptively reasonable "lodestar" fee* is hardly a matter of indifference to a defendant in such circumstances. No manufacturer wishes to risk being perceived by its customers as having compromised its warranty or other obligations to them while enriching a group of attorneys.

Numerous other indefensible aspects of this situation, particularly the conflicts of interest involved, are canvassed in the petition and will not be repeated here. *Amicus,* for its part, notes that even the "factual"

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2. In this case, for example, the nearly $1.5 million in enhancements, which the court of appeals conceded could not be awarded had the case been fought to a finish, would fund 10,000 hours of lawyer time at an average of $150 per hour.

premise of the circuit court's attempt to distinguish away *Delaware Valley II*, the defendant's supposed lack of financial interest in the attorney fee doctrine applicable to a settlement fund, is simply wrong.

Attorneys in Commercial Litigation Have No Special Claim to the Case-Specific Windfalls Rejected in *Delaware Valley II*.

Even if it were factually valid, the court of appeals' "common fund/statutory fee dichotomy" does not support a special multiplier rule in common fund cases. There is no equitable basis for allowing counsel to exact a greater toll from a fund's "faultless beneficiaries" than they would be permitted to collect from a defendant found guilty of wrongdoing. See Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 928 (1975). There are equally compelling reasons for not preferring one class of lawyers over another in awarding fees.

Under *Delaware Valley II*, "compensation for contingency must be based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." 107 S. Ct. at 3089 (O'Connor, J., concurring in judgment). Moreover, "[b]efore adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Ibid.* (plurality); 107 S. Ct. 3091 (O'Connor, J. concurring). It would be difficult to imagine a case farther removed from the relevant "counsel-finding" standard than the instant action.

The case below which was settled in Chicago consolidates five separate federal and state actions. 661 F. Supp. at 1372-74. By the time of settlement, no fewer than 29 lawyers from nine different law firms, including counsel from Washington, D.C., New York City, Chicago and Los Angeles, had devoted time to the matter and been awarded fees by the district court. *Id.* at 1393. Nothing in the record even suggests that this battalion was solely dependent on this action for its livelihood, or was otherwise unoccupied while this litigation proceeded.[3] It is equally difficult to view the prospect of $2.4 million in "lodestar" fees "based on actual time expended", 15 U.S.C. § 2310 (d)(2), as a disincentive to similar cases.

The rule announced by the court of appeals will often if not exclusively operate as it did below, allowing attorneys in purely commercial matters to reap fee harvests unavailable to those of the bar who elect to devote themselves to the vindication of less tangible interests, even where those interests are the declared objects of fundamental national policies. The absurdity and inequity of this result is so patent as to call into play a fundamental concern which has repeatedly found expression as courts have struggled with fee award questions—the integrity of the courts, and of equal importance, the public's perception of that integrity.

Indeed, it is interesting that this concern has often been best articulated precisely in commercial common fund cases, in which significant monetary recoveries so

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3. The 1989 edition of the Martindale-Hubbel directory of attorneys shows that the nine plaintiffs' firms in this case employ a total of approximately 130 attorneys. Counsel here clearly had the means to spread their risk and hedge their bets.

often supply the pretext for equally noteworthy fee requests:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough,* [105 U.S. 527 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' 105 U.S., at 536.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974). See also e.g., *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 569-70 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952); *In re Armored Car Antitrust Litigation,* 472 F. Supp. 1357, 1382 (N.D. Georgia. 1979); *Cherner v. Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963) (Wyzanski, J.).

It is also significant, and ironic, that common fund fee award cases were among the very first to question the case-specific risk multipliers ultimately rejected by this Court in *Delaware Valley II,* on grounds fully applicable here. E.g. *City of Detroit v. Grinnell Corp.*, 560 F.2d at 1099 ("We have considerable doubt about the justice of charging members of one class higher fees to compensate counsel for failing to recover for another

class.") (quoting *Liebman v. J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 697 (N.D. Ill. 1974)).

In short, the common fund escape hatch from *Delaware Valley II* which the court of appeals created comports neither with policy, history, equity or logic. Review by this Court, *amicus* respectfully submits, is urgently needed.

II. THE COURT OF APPEALS' ERRONEOUS CONSTRUCTION OF THE FEE PROVISION OF THE MAGNUSON-MOSS ACT WILL SOW PLAIN FEDERAL ERROR AMONG THE STATE COURTS, IN WHICH MOST PRIVATE LITIGATION UNDER THE ACT IS CONDUCTED.

The precedential importance of the decision below is not confined to the federal courts, which have already cited and relied upon it several times. See Petition at 24-25 n.9. Because of the specific features of the enforcement structure of the Magnuson-Moss Act, the decision below will directly influence state court decisions across the nation in this area.

The Role of State Courts Under Magnuson-Moss

Though private actions under the Magnuson-Moss Act may be brought both in federal and state courts, Congress placed substantial jurisdictional barriers in the path of federal actions. 15 U.S.C. § 2310 (d)(1), 15 U.S.C. § 2310 (d)(3). These provisions, particularly as to multi-party and class actions, have been strictly

applied by the federal courts.[4] As a result, the state courts are, as Congress intended, the primary arena of litigation, both individual and class actions, under the statute.[5]

The court of appeals' decision in this case will inevitably be accorded great deference by state courts eager for authoritative guidance in applying the Act. The misconstructions of the governing provisions by the court of appeals which could thus infect the state court systems are fundamental. Under the court of appeals' erroneous reading, the clearly intended applicability of the Act to settlements and the prohibition on multipliers are both nullified. Differing state doctrines would thus control in each case, directly undermining the uniform prescriptive effect of the Congressionally specified fee provision. See *Walsh v. Ford Motor Co.*, 807 F.2d at 1014 (explicit federal prescriptions in the Act "apply as written.") Federal appellate review of state rulings following the court of appeals' decision is problematical. There is therefore no reason to withhold such review at this time.

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4. E.g., *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (2d Cir. 1986) (100 named plaintiff requirement for federal class action jurisdiction demands 100 claims sufficient to withstand summary judgment); *Saval v. BL, Ltd.*, 710 F.2d 1017 (4th Cir. 1983)(individual claims must meet standards of Rule 20, F.R.Civ.P, to be aggregated to satisfy $50,000 "in controversy" requirement).

5. 15 U.S.C. § 2310 (d). See *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 n.38, 1013 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (statute confines the "mine-run" of Magnuson-Moss cases to state courts).

The Court of Appeals' Erroneous Reading of the Act

In avoiding the plain text of the fee provisions of the Magnuson-Moss Act, the decision below is at odds with legislative history, the statutory scheme, and this Court's construction of similar language in other remedial Congressional enactments.

The court of appeals' professed inability to find evidence that the fee provision of Magnuson-Moss applies to settlements, 860 F.2d at 256 n.7, fails to square even with the statutory text. In fact, the settlement of this case, on its face, met both relevant statutory criteria for an award of fees under the Act. By establishing a minimum $17 million fund for their class, plaintiffs "finally prevailed," and that result was embodied in a "judgment" which included a fee award, exactly as prescribed by the Act. 15 U.C.S. § 2310 (d)(2).[6]

Moreover, as the Petition notes, at page 23, the drafters of the Act stated that a prevailing plaintiff, "if successful in the litigation (including settlement)", could invoke the Act's fee provision, in a Senate Report which the court of appeals appears to have overlooked. S. Rep. No. 151, 93rd Cong., 1st Sess. 22-23 (1973). Lastly, the policy considerations underlying the Act, particularly the explicitly declared Congressional encouragement of dispute resolution short of full trial, 15 U.S.C. § 2310 (a)(1), militate strongly in favor of the "plain meaning" of the statute. This Court's construction of the "prevailing party" requirement under similar enactments should accordingly govern the virtually

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6. The provisions of the Order of October 30, 1986, which dismissed all claims of the class with prejudice and awarded fees in accordance with the district court's opinion are summarized in the opinion below. 661 F. Supp. at 1396.

identical concept embodied in the Magnuson-Moss Act. See, *e.g.*, *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (civil rights).

The reasoning by which the court of appeals purported to reconcile multipliers of up to 200% with the Congressional command that Magnuson-Moss fees shall be "based on actual time expended," 860 F.2d at 257, is pure sophistry. On this basis, any fee can be supported as "based on actual time expended" merely by the application of an appropriate multiplier. Arithmetic cannot be made to substitute for policy. In addition, the reading adopted below, by rendering the quoted language superfluous, directly violates the fundamental canon of construction that Congressional enactments shall be construed so as to give meaning and effect to all their provisions. E.g., *Fidelity Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 163 (1982); *Jarecki v. Polaroid Corp.*, 367 U.S. 303, 307-08 (1961) (Where a "statute admits a reasonable construction which gives effect to all its provisions, ... we will not adopt a strained reading which renders one part a mere redundancy.")

Such judicial nullification of statutory language is especially indefensible where the provision at issue is a distinguishing characteristic of the statute under consideration. In fact, Magnuson-Moss is one of several statutes among the two hundred odd attorney fee provisions of the federal code in which Congress took the trouble to insert language restricting fees to those

"based on actual time expended."[7] E.g. 15 U.S.C. § 2060(f) (Consumer Product Safety Act); 49 U.S.C. § 1686 (e) (Liquid Gas Pipeline Safety Act; and 49 U.S.C. § 2014(e) (Hazardous Liquid Pipeline Safety Act). This vital language cannot, as below, simply be read out of the Act.

CONCLUSION

For the reasons stated, *amicus* respectfully submits that the petition should be granted.

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7. Indeed, the only language in 15 U.S.C. § 2310 (d)(2) sanctioning any departure from the "lodestar" amount grants the court discretion to dispense with fees entirely where an award would be "inappropriate". Thus, Congress, in Magnuson-Moss, authorized reasonable attorney fees "based upon actual time expended" or a court's disallowance of such fees. It did *not* authorize an *increase* in such fees.